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Supreme Court of the United States.

OCTOBER TERM, 1964.

No.

FREDERICK MOYNIHAN,
Petitioner,
v.
NEW YORK CENTRAL RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, Frederick Moynihan, prays that a writ of certiorari issue to review the judgment of United States Court of Appeals for the First Circuit entered in the above case on November 20, 1964, petition for rehearing having been denied on December 22, 1964.

Opinion Below.

No opinion was rendered in the District Court.

The opinion of United States Court of Appeals for the First Circuit is printed in the appendix hereto (pp. 13-19) and also annexed to the record of the Court below (R. 219), and is reported in 338 F. 2d 644.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on November 20, 1964 (R. 226). A timely

petition for rehearing was filed on December 3, 1964, and the same was denied on December 22, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented.

1. Whether a Court of Appeals may apply substantive law which is in direct conflict with the applicable state law as set forth by the highest Court of the State.

2. Whether a Court of Appeals may disregard jury findings supported by evidence and thereby violate the Seventh Amendment right of trial by jury.

The issue is whether a "scaler" or "sampler" of foreign import goods at work at a place designated by his employer in a shed of an ocean pier operated by the defendant is entitled to hold a verdict awarded him by a trial jury in an action against the pier operator for personal injuries suffered when "skids," constructed by defendant and furnished for the use of the pier, and being wood platform assemblies, weighing each a thousand pounds or more, and being thirteen feet long, four feet wide and of an "edge" six inches wide, fell over on him from an upright position, that is, from "on edge"—the long edge—after having been in that position in the shed for more than a day prior and within an hour of having been measured by tape but not handled by carpenter employees of the defendant who (1) knew that the position "on edge" was not the usual custom and practice, knew that they were not supposed to be on edge, and knew the position to be dangerous, knew that in that position they were "unbalanced," and (2) took no counter-measure and gave no warning ("it ain't up to us") of danger to plaintiff and other scale workers at their task only a few feet away. The Court below convicted the plaintiff as matter of law of having knowledge of the danger by reason of an

answer on cross-examination, "I know it was dangerous," to a question, "Did you know then it was dangerous for them to be on edge?" The Court below so ruled notwithstanding that it declared its own inference that Shute, the employer of plaintiff, did not know of the danger where, upon consideration of a danger, he had touched the skids and considering their weight had thought there was no danger of their falling (footnote 2, Opinion of Circuit Court of Appeals). The Court brushed aside plaintiff's contention that the jury could have found in fact that plaintiff was expressing knowledge acquired after the fact. Ignored was the effect of another answer on cross-examination, that he did not expect the skid to come over; and, on redirect, that the workers were going along at the normal rate of speed, he saw the skid and that was it; he did not think they should have been there or should not have been there.

Constitutional Provision Involved.

The Seventh Amendment to the Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The Court of Appeals has invaded the province of the jury and has substantially interfered with plaintiff's right to a decision by the jury on fact questions.

Conflict with Applicable State Law.

The decision is in total conflict with applicable decisions of the Supreme Judicial Court, Commonwealth of Massa-

chusetts, holding that petitioner has a right of action in the circumstances here presented.

Statement.

This action was originally brought by plaintiff, Frederick Moynihan, of Boston, in the State Court, against the defendant, a corporation. The defendant removed the action to the District Court on the grounds that it was a citizen of Delaware and that the amount in controversy exceeded the jurisdictional amount of $10,000.

The plaintiff's declaration alleged that he received severe personal injuries while working on Pier 3, East Boston, when he was struck by two skids that fell on him, said skids being owned and controlled by the respondent, New York Central, and the injuries being due to negligence of the New York Central in permitting the skids to fall on him.

The claim of Moynihan to trial by jury was endorsed on his writ as sued out by him. Jury trial was had before Judge McCarthy in the District Court at Boston, and resulted in a verdict of $60,000 for plaintiff.

Defendant railroad was lessee and operator of Pier 3, East Boston. Moynihan was an employee of one Shute, a public weigher and sampler of import cargoes. An ocean carrier which paid defendant $100 a day when it used the pier had brought certain cargo to dockside in a freighter, the same had been unloaded onto the pier, and Shute confirmed arrival notice from the consignee with the ocean carrier's office. On November 28, 1962, he put his men to work to weigh and sample drums of aluminum oxide. Defendant's terminal manager or freight agent at Pier 3 testified that Shute and his men had a right to be on the pier—"it is a custom over the years that certain people that have operations to perform on the pier are allowed to go on the pier."

Shute set out the work and put his men to their tasks in a certain shed. Five or six feet away two "skids" were leaning against the wall on the long edge. These skids, which had been built and maintained by defendant and provided by it for the "use of the pier," were constructed of lumber, thirteen feet long, four feet wide, and six inches on the edge, and each weighed around 1,000 pounds. They had been in that position for at least a day. On that morning Shute put his hand on the skids and felt they were large and heavy and they should not move. This was in the process of setting up the work and putting his men to work. While the men were at work and about an hour before the time of the accident two carpenters, Scroggie and Benoit, experienced employees of the defendant, came to the place in performance of their assignment and measured the length of the skids by a tape without touching them. They testified that they found them "on edge," that is, not flat. Defendant's employee Scroggie testified that it was not the usual custom and practice to keep the skids on edge. Defendant's employee Benoit testified they were not supposed to be on edge; he knew it to be dangerous. Scroggie, being asked if the reason for laying them flat on the floor was that they were in danger of falling down if left on edge, replied: "Well, they are unbalanced." Griffin, defendant's agent in charge of the pier, testified that normal practice with the railroad is that the skids be on the flat; it is a safety measure. The skids are not supposed to be on edge: "The railroad men would not leave them on edge if we saw them." Moynihan testified that nobody gave him a warning. While he was working with his back to them the skids fell over without any advance indication of trouble and pinned him down, breaking his right leg. Asked if they did anything about the skids, Benoit, defendant's carpenter, replied: "No, it ain't up to us."

Certain questions were asked of Moynihan on cross-examination, to establish that he knew of the danger of the position of the skids. He saw the skids leaning up against the wall.

"XQ. They looked all right to you? A. Yes.

"XQ. You weren't worried about them there? A. Well, that wasn't my job, I had nothing to do with it. I had no reason to worry about it.

"XQ. Well, you were over there to work near them? A. That's right.

"XQ. And you didn't tell anybody to move them before you went to work in that location, did you? A. No, because I figured—

"XQ. Please, answer the question. Did you tell anybody? A. I didn't tell nobody.

"The Court. Why, why didn't you tell somebody?

"The Witness. Well, I had no reason to because we had nothing to do with the skids.

"The Court. You never used them?

"The Witness. We never use them. We are working on a different item altogether.

"XQ. (By Mr. Donahue) And you didn't expect any trouble from them, did you? A. Well, I never expected no trouble, no.

"XQ. They looked all right to you? A. Well, they were on edge. I know they were dangerous because they are supposed to be lying flat on the deck. That's a safety rule.

"XQ. Did you see them on edge? A. Yes.

"XQ. Did you know then it was dangerous for them to be on edge? A. I know it was dangerous.

"XQ. Did you go to anybody and say, 'Move those down'? A. No, I had no reason to.

"XQ. Because you didn't worry about them? A. Well, I figured the railroad or shipping company was going to use them fast, so—they were around there and they were going to use them right away." (R. 31, 32.)

"Q. (By Mr. Greenberg) Mr. Moynihan, in the work you were doing there, did you have anything whatsoever to do with those skids? A. Not a bit, no.

"Q. It had nothing to do with your work? A. We had nothing to do with them at all.

"Q. And where you were doing your work was where you were told to do it, is that right? A. That's right.

"Q. And now you told his Honor and the Jury you saw the skids about an hour before your accident? A. Yes, when I first entered the section.

"Q. You didn't pay any particular attention to them? A. No.

"Q. You just saw them against the wall? A. Yes, saw them and took it for granted somebody was using them.

"Q. And from the time of nine o'clock when you saw the skid for the first time and the accident at ten— A. Yes.

"Q. Did you take any time off? A. We take time off at ten—

"Q. Before your accident, did you take any time off? A. No.

"Q. Were you working fast or slow? A. We were going along at the normal rate of speed.

"Q. And you saw the skid and that was it? A. That's it.

"Q. You didn't think they should have been there or shouldn't have been there? A. No." (R. 38.)

Reasons for Granting the Writ.

I. The order of the Court below that a judgment be entered for the respondent has, in effect, deprived petitioner of his constitutional right to trial by jury.

In a number of ways the Court of Appeals arbitrarily substituted its judgment of facts for facts found by the jury. For one matter, it ruled that plaintiff's answer, "I know it was dangerous," was not an answer in the present tense, and thus indicated after-acquired knowledge of the danger of the skids, but was an answer to be taken in the past tense as showing knowledge at the time of the accident. Thus the foundation of the Court of Appeals judgment was erected by means of a gross invasion of the right of the jury to determine the meaning of plaintiff's language. The Court of Appeals indulges in elaborate analysis of plaintiff's responses in order to justify its conclusion. The jury by the same process of analysis could equally have determined that the plaintiff was referring to knowledge acquired after the accident.

The plaintiff had a right to the determination made by the jury.

> *Williamson* v. *Feinstein,* 311 Mass. 322, 325.
> *Murphy* v. *Boston & Maine Railroad,* 319 Mass. 413.
> *Howes* v. *Kelman,* 326 Mass. 696.
> *Brown* v. *Metropolitan Transit Authority,* 345 Mass. 636, 640.

It is also the law of Massachusetts that all the testimony of a party on a particular fact is to be considered by the jury, and the jury may give a total effect to the party's testimony which is inconsistent with the effect of particular selected portions.

> *Fitzgerald* v. *McClymont,* 314 Mass. 497, 499.

Here again the Court of Appeals has violated the principle of jury trial by preventing consideration of other testimony of plaintiff that he did not expect to get hit; he did not expect the skid to come over; he was not disturbed about their leaning; they were the furthest from his mind because he was busy with his own drum; he saw them (the skids) and took it for granted somebody was using them; work was at the normal rate of speed and he saw the skid and that was it; he did not think they should have been there or shouldn't have been there—all cumulatively allowing a jury inference that plaintiff did not then know the danger of the situation, especially where the two railroad employees, Scroggie and Benoit, had been measuring the skids in the range of observation of the scale workers, a circumstance that could have given an impression of safety to the scale workers only a few feet away, and that could have imposed an affirmative duty of expressing the warning called for by the knowledge of Benoit and Scroggie that the skids were in a dangerous "on edge" position.

Within the rules of decision firmly promulgated by this Court the case was one where the jury's decision was final as having a reasonable basis and where special and important reasons exist for issuance of the writ of certiorari for the reason that the lower Court has deprived this litigant of his right to a jury determination.

Senko v. *LaCrosse Dredging Corp.*, 352 U.S. 370, 374.

Gibson v. *Phillips Petroleum Co.*, 352 U.S. 874.

II. The decision of the Court of Appeals is in direct conflict with controlling decisions of the highest Court of the State.

Where the plaintiff was an invitee of the defendant operator of the pier (*Wendell* v. *Baxter*, 12 Gray 494; *Silva* v. *Henry & Close Co.*, 279 Mass. 334; *Hayes* v. *Boston Fish*

Market Corp., 319 Mass. 556) the defendant owed to him a duty to use reasonable care to keep the premises in a reasonably safe condition or to warn him of dangers not obvious to the ordinary person but which were known or should have been known to it.

The Massachusetts law recognizes that an actionable wrong has been done to a person in the position of the plaintiff notwithstanding a quantum of knowledge on the part of the injured person that the offending object was in a condition of danger to him.

> *Barrett* v. *Builders' Patent Scaffolding Co., Inc.*, 311 Mass. 41.
>
> *Hayes* v. *Boston Fish Market Corp.*, 319 Mass. 556.
>
> *Lajeunesse* v. *Tichon's Fish & Fillet Corp.*, 328 Mass. 528.

In *Hayes* the plaintiff, having alternative routes, chose as his path of access to his fishing vessel a cap log which he had observed to be covered with fish slime. Held: that the plaintiff could have been found to have used reasonable care and that he should hold his verdict. In *Lajeunesse* plaintiff was taking out bundles from premises whose flooring intermittently became slimy from clogged fish drains. At page 531 of *Lajeunesse*: "In other classes of cases it has often been held that a plaintiff is not negligent as matter of law merely because he saw or knew the danger, especially where he had a duty to perform which took him into proximity to it."

In its aspect least favorable to the plaintiff, the plaintiff's case is at least on a level with the holding in *Barrett* v. *Builders' Patent Scaffolding Co., Inc.*, 311 Mass. 41. There the plaintiff was pitched from a scaffolding by the tilting of a warped board on the platform on which he was working. He had observed the use of warped boards. He

saw that the board in question was warped, but could not tell whether or not it was shimmed. It was held that the plaintiff was entitled to hold his verdict; that plaintiff had a right to assume to a reasonable extent that boards so warped that they should not be used would in fact not be used or would be shimmed; that he had the right to assume that reasonably safe scaffolding had been provided; and that it was *a jury question whether the dangerous condition of the plank was obvious.*

All the foregoing applies to the plaintiff in this case. Experienced railroad employees had been "measuring" the skids in the presence of the plaintiff only an hour before the accident. Plaintiff's employer had positioned the work and, testing the skids on edge, had found them safe. These factors could strongly have influenced the jury to conclude that the danger was not obvious. Plaintiff's employer was wrong as it turned out. Defendant's employees were right in their conclusion that the skids were dangerous "on edge." A warning from them which they were free to express and which would have been the easiest matter to give could have avoided the whole accident.

The Court below averred that plaintiff was in no position to say he was not warned. He is in position to say he was not warned for in fact neither defendant's employees (who knew) nor anyone else gave him any warning. So far as the circumstances themselves might be said to give him warning, this was a question of fact for the jury. The tilt might have been against the wall, a circumstance to negative obviousness of risk. The persons best qualified to know—the experienced railroad men, because they were nearest to the skids and measured them—said nothing, and this factor could well have been found by the jury to convey an assurance of safety to the party of scalers, on the basis either that the position was not dangerous, or that they had taken some simple corrective measure, such as the use of shims.

III. The question here involved is of great and demanding importance.

There are more than 5,000 foreign corporations doing business in the Commonwealth of Massachusetts, as disclosed by records of the Department of Corporations and Taxation. Annually a large number of claims against such citizens of other states as well as against individuals, citizens of foreign states, must arise. If the United States Courts become a haven for denial of jury trial and for adjustment of rights arising under the local law in such a marked conflict with established State law as is disclosed by the record in this case, then the normal pattern of removal will be seriously distorted, for selfish reasons unbecoming to modern and enlightened administration of justice. Unless this Court exercises its power of supervision it is likely that we shall have the unseemly and disturbing spectacle of one system and theory of law prevailing in the State Court and another and markedly different system prevailing in the District Court when exercising diversity jurisdiction.

Conclusion.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel:
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NATHAN GREENBERG.

Appendix.

United States Court of Appeals
For the First Circuit

No. 6353.

NEW YORK CENTRAL RAILROAD COMPANY,
DEFENDANT, APPELLANT,
v.
FREDERICK MOYNIHAN,
PLAINTIFF, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before HARTIGAN and ALDRICH, *Circuit Judges*, and DAY, *District Judge*.

Timothy H. Donohue, with whom *Stephen A. Hopkins* and *Sherburne, Powers and Needham* were on brief, for appellant.

Thomas B. Shea, with whom *Nathan Greenberg* was on brief, for appellee.

OPINION OF THE COURT.

November 20, 1964.

ALDRICH, *Circuit Judge*. The plaintiff, an employee of Dyke Shute, a public weigher and sampler, was injured on the morning of November 28, 1962 while working on a pier in East Boston when two skids fell over onto him. The defendant railroad is the lessee of the pier. It appeals,

following a verdict for the plaintiff, because of the court's failure to grant its motion for judgment. It also asserts errors in the charge and sundry other matters.

Plaintiff's evidence would warrant the following. The section of the pier in which plaintiff was working was an enclosed shed about 35 yards wide by 70 long. A railroad track extends into the pier. The defendant makes a per diem charge to vessels docking alongside. It has nothing to do with the unloading of cargo, or the loading of it into trucks. If any freight is to be shipped out over its lines defendant hires a contractor to load its cars. On November 21-24 cargo was discharged from a vessel, including drums of aluminum oxide destined to be shipped out by rail. Apparently in connection with accepting the drums the consignee desired the services of Shute.[1] On the morning of November 28 three employees of Shute, including plaintiff, were engaged in emptying full drums into empty ones and weighing and sampling the contents. Shute had moved the drums to a separate space in the shed where they could be worked on. One drum was placed within six feet or less of two skids that were standing on edge against the wall. The skids, some thirteen feet long and four feet wide, and weighing 1,000 pounds, were owned by the defendant, and were furnished by it for the convenience of shippers. Skids (there were many in the shed besides these) were used primarily by longshoremen, but occasionally they were used by the contractor in loading defendant's cars. There was no evidence as to who had placed these particular skids where they were, or when they did so, but there was evidence that they had been there for a day or more.

While plaintiff was working with his back to the skids they fell over, causing him serious injury. No explanation

[1] There is no contention that the drums in question had been delivered to the defendant on November 28, or that defendant had any connection with Shute.

has been offered as to why they fell. Several employees of the defendant called by the plaintiff, however, and plaintiff himself, testified that it was dangerous to leave skids placed on edge, and that they were supposed to be left flat.[2]

Plaintiff makes much of the presence of two railroad carpenters measuring (but not touching) the skids on the morning in question prior to the accident, and the fact that they did nothing about their unsafe position. The carpenters were called by the plaintiff, and testified that attending to the position of the skids was not within their duties. There is no reason to doubt this disclaimer, particularly as much was made during the trial of the fact that there were a number of unions on the pier. However, quite apart from the presence of the carpenters, we will assume, from the length of time that the skids had been there, that the defendant was on notice. The defendant, accordingly, was under a duty. We will also assume in plaintiff's favor, because of the interest defendant might be thought to have in pleasing users of the pier, that plaintiff, in performing services for a consignee of cargo, could be found to be a business invitee of the defendant as distinguished from a

[2] Shute, called by the plaintiff, testified that he had initially considered the possibility, but after touching the skids and considering their weight had thought there was no danger of their falling. The court, however, during cross-examination cast doubts upon his qualifications in this respect. Frankly, it is not clear to us why the skids were likely to fall. The so-called "edge," as shown in plaintiff's photographic exhibit, is square, and of considerable width because of the skid's thickness. Nevertheless, the skids did fall, and on the testimony we must take it that to knowledgeable persons this was foreseeable. Shute's ignorance did not mean that he was indifferent to his men's safety. On the contrary, the inference is inescapable that had he known of the danger he would have placed the drums elsewhere. It is further clear, both from the testimony and the photograph, that there was ample space to have done so. In other words, this is not in any way a case where plaintiff was obligated to work where he did.

mere licensee. The questions, therefore, are what was the scope of defendant's obligations to plaintiff, and was it met.

In Massachusetts the duty towards an invitee is not what the district court frequently told the jury, to provide a safe place to work, but is normally in the alternative, to use reasonable care to provide a place which is safe, or to give warning to the extent that it is unsafe. *LeBlanc* v. *Atlantic Bldg. & Supply Co., Inc.*, 1949, 323 Mass. 702, 705; see *Wilson* v. *Conlin*, 1959, 338 Mass. 295, 297. In *Dunn* v. *Sammet*, 1956, 335 Mass. 162, at 163, the court spoke of this as the "familiar rule," and it is reiterated in a number of the cases cited by the plaintiff. The court sometimes recognizes an exception, where, because of convenience or necessity, the invitee might reasonably be expected to use the premises even with knowledge of the danger. See *e.g.*, *Hayes* v. *Boston Fish Market Corp.*, 1946, 319 Mass. 556. But *cf. O'Neil* v. *W. T. Grant Co.*, 1957, 335 Mass. 234. That exception applies only when the invitee could be said to be reasonable in consciously incurring the risk, *cf. LeBlanc* v. *Atlantic Bldg. & Supply Co., supra; Gadowski* v. *Union Oil Co.*, 1 Cir., 1964, 326 F. 2d 524, and does not apply when the invitee might reasonably be expected to confine himself to the safe portion of the premises. *Greenfield* v. *Freedman*, 1952, 328 Mass. 272. The warning need not be explicit, but may be implicit merely from the nature of the premises. *Vance* v. *The Wayside Inn, Inc.*, 1957, 335 Mass. 617; *O'Hanley* v. *Norwood*, 1944, 315 Mass. 440. Thus in *Rego* v. *Sagamore Mfg. Co.*, 1940, 305 Mass. 346, the defendant was washing its floor. Apparently it was customary for it to place a red sign indicating the danger. In ordering a verdict for the defendant the court stated that the absence of the sign was immaterial because the plaintiff had seen that the floor was being washed, and because, due to her familiarity with the premises (based on three weeks' employment) she must have known that the floor had spots of oil which would make it peculiarly slippery when wet.

In the case at bar the plaintiff had far greater familiarity, and actual, rather than presumed knowledge, of the unsafe condition. Plaintiff was 50 years old. He had worked around piers "pretty much all [his] adult life . . . [and] was familiar with the operation around piers and the equipment. . . ." Prior to his present job he had been a longshoreman. He had seen skids "for years," and was "familiar" with them. When he came to the section that morning where the skids were he observed them against the wall. Asked whether he was worried about them he replied, "Well, that wasn't my job, I had nothing to do with it. I had no reason to worry about it." Asked why he told no one, he said, "Well, I had no reason to because we had nothing to do with the skids."[3] "XQ. They looked all right to you?" "A. Well, they were on edge. I know they were dangerous because they are supposed to be lying flat on the deck. That's a safety rule." "XQ. Did you know then it was dangerous for them to be on edge?" "A. I know it was dangerous." Asked once more, ". . . you didn't worry about them?" he replied, "Well, I figured the railroad or shipping company was going to use them fast, so—they were around there and they were going to use them right away."[4]

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[3] The significance of this testimony was pointed up by an argument made before us by plaintiff in another connection. If plaintiff was a mere licensee, the defendant's only duty was to refrain from wilful or wanton conduct, *i.e.*, gross negligence, or worse, a distinction we need not pursue. Plaintiff argued that this was supplied or shown by the reply of one of defendant's carpenters, when asked on the stand why they did not move the skids when they saw them on edge, "It ain't up to us." Plaintiff argued, what could be more callous? Apparently it is of no consequence when plaintiff shrugs off the warning implicit in the situation, but wanton when defendant's carpenters do so.

[4] The basis of this assumption is not clear because on plaintiff's own uncontradicted testimony no one came near the skids that morning except the carpenters with a tape measure.

Plaintiff's counsel, from plaintiff's use of the word "know" in the present tense, seeks to argue that it was only since the accident that plaintiff knew that it was dangerous for skids to be left on edge. We cannot agree. On other occasions the plaintiff used the present tense instead of the past. It is apparent on the record that he was not skilled in precise English. His counsel's contention would not only make his answers totally unresponsive, but if he meant what is now argued, the natural answer to the questions would have been a simple "No," not four sentences totalling thirty words. Furthermore, the other four answers we have quoted, giving other reasons for doing nothing about it, are entirely inconsistent with the thought that plaintiff did not know at the time that the skids were not supposed to be there. We cannot accept plaintiff's strict use of grammar which would produce so strained a result. Furthermore, in view of plaintiff's long knowledge, awareness on his part could be assumed. *Rego* v. *Sagamore Mfg. Co., supra; Flanders* v. *Pailey,* 1947, 320 Mass. 744.

We have examined the cases relied upon by the plaintiff. They are not in point. One group concerns hidden defects. Another is where there were special reasons why it might be expected that plaintiff would reasonably go where he did in spite of the known risk. A third is where the defendant was guilty of affirmative misconduct, such as negligent driving of a truck. In addition, plaintiff summarizes at some length three cases which he describes as "comparable situations," *Flaherty* v. *N.Y., N.H. & H. RR.,* 1958, 337 Mass. 456; *West* v. *Molders Foundry Co., Inc.,* 1960, 342 Mass. 8, and *Fahey* v. *Osol,* 1959, 338 Mass. 429. In *Flaherty* the plaintiff's employment required him to deal with the very situation which the defendant had created. In *West* plaintiff's work obliged him to go in the danger zone. In neither of these cases was there any question raised of obviousness of the danger. In *Fahey,* where that

matter was considered, the court expressly said that on the plaintiff's evidence it was not obvious. We cannot agree that these cases present comparable situations. Rather, plaintiff here knew of the danger, and chose to ignore it. He was free to conclude that the danger was not sufficient for him to worry (an attitude common, we may assume, to the vast majority of persons who get injured) but he was in no position to say that he was not warned. Correspondingly he was not privileged to put the knowledge which he had received out of his mind and then seek to charge the defendant. *LeBlanc* v. *Atlantic Bldg. & Supply Co., supra.*

Judgment will be entered setting aside the verdict and vacating the judgment thereon and ordering the entry of judgment for the defendant.

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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 1001.

FREDERICK MOYNIHAN, PETITIONER,

v.

NEW YORK CENTRAL RAILROAD COMPANY,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 1001.

FREDERICK MOYNIHAN, PETITIONER,

v.

NEW YORK CENTRAL RAILROAD COMPANY,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. Counter-Statement of the Case.

1. District Court Proceedings.

The petition involves, not an action under the Federal Employers Liability Act, but a common-law action in tort for negligence commenced by the petitioner in the Superior Court of Massachusetts in February of 1963 (R.A. 6-8). In his declaration the petitioner alleged that he sustained personal injuries as a result of the negligence of the respondent railroad and the Nacirema Operating Co., Inc. (R.A. 8-9). Based upon the diversity of citizenship of the parties, the action was removed by the respondent to the Federal District Court for the District of Massachusetts (R.A. 1, 3-6). Thereafter, on petitioner's motion, the United States Lines Co., Inc., on September 17, 1963, was added as a third-party defendant (R.A. 1, 11).

The case was transferred for jury trial to Judge William T. McCarthy (retired, by designation) (R.A. 1). The

trial began on February 6, 1964, and continued through February 11, 1964, at which time it adjourned, by agreement of the parties, because of the temporary physical incapacity of the trial judge (R.A. 1-3, 197). Trial got underway again on March 3, 1964, and finally concluded on March 12, 1964, when the jury returned a verdict for the petitioner (R.A. 3, 213). Prior to submission of the case to the jury, the respondent's motion for directed verdict had been denied (R.A. 2, 15). Motions for directed verdicts filed by United States Lines and Nacirema were allowed by the Court (R.A. 19).

2. Additional Facts.

Although the statement set forth in the petition does describe the factual background of the case in a general way, there are certain additional facts which the respondent feels should be brought to the Court's attention for a full and fair analysis of the petition.

The respondent was the lessee of Pier 3, the site of the petitioner's accident (R.A. 108, 137, 153). This pier is in the nature of an enclosed dwelling (R.A. 217), and is divided into sections by walls and bulkheads (R.A. 51, 125). When the plaintiff was injured on November 28, 1962, he was working in one of the sections on the west side of the pier as an employee of Dyke Shute, a firm which from time to time operated on the pier but which did not have any contractual relationship with the respondent (R.A. 119, 120, 122, 143). The particular section in which the accident occurred was approximately 100 feet wide and 200 feet long (R.A. 52). The petitioner, having worked on Pier 3 and the waterfront in general for many years, was very familiar with the area (R.A. 22-23, 29).

On the morning in question, Shute told the petitioner and two other employees to move certain drums, which were to be sampled, from Section 3 of the pier to Section

2 (R.A. 60, 125). Although Section 2 was large and there was nothing to prevent the men from setting the drums anywhere in the section (R.A. 67), they positioned the drums within close proximity to two skids which were resting on edge, leaning back against the bulkhead wall which divided Section 2 (R.A. 59, 61, 67, 68, 124). The drums were set out between 8 a.m. and 9 a.m. that morning. The skids had been in that position for at least two days (R.A. 125).

The plaintiff and his two fellow employees began the work of taking samples from the drums[1] without taking any precautionary measures as to the skids (R.A. 42, 61, 68-69). Later, at approximately 10 a.m., while the plaintiff was working around one of the barrels near the skids, the skids suddenly fell over, injuring the petitioner (R.A. 25, 36, 41-42). Neither the petitioner nor the two other workers who were working with him at the time of the accident could say what caused the skids to fall from the position they had been in for at least two days.

3. Appeal.

After judgment was entered upon the verdict, the respondent seasonably took appeal to the Court of Appeals (R.A. 21-22). The respondent contended on appeal that the trial Court erred in denying its motion for directed verdict because the petitioner's own evidence showed that (1) he was merely a licensee to whom the respondent owed only the duty to refrain from wilful, wanton or reckless

[1] In weighing the barrels the petitioner used the chain fall hoist. This is a steel frame with two legs from each end, about 15 feet high and 4 feet long. The legs were on wheels and the chain falls from the center of the crossbeam. It takes two men to push the hoist from one place to another. The hoist is used to lift a drum high enough to empty its contents into an empty drum in order to get a proper sample (R.A. 33, 34-35, 39).

misconduct, and there was no evidence of a breach of such duty; or (2), even if the plaintiff was a business invitee, there still was no evidence that the respondent breached the duty it owed to him in such capacity. In addition, the respondent also contended in the Court below that the trial judge committed numerous prejudicial errors in his charge to the jury and in his conduct during the course of the trial.

After the questions were fully briefed and argued, the Court of Appeals on November 20, 1964, rendered a unanimous decision setting aside the verdict and ordering entry of judgment for the defendant (Opinion, Pet. 19; reported at 338 F. 2d 644). In reaching this result the Court did not pass upon the question of whether, on the evidence, the plaintiff would have had to be considered a licensee, but held that, even assuming in the petitioner's favor that he was a business invitee, there still was not sufficient evidence to warrant the submission of the case to the jury (Opinion, Pet. 15-16). The Court, of course, also did not reach the questions raised regarding the trial Court's instructions and conduct.

A petition for rehearing was filed by the petitioner on December 3, 1964, and the Court denied the petition without opinion on December 22, 1964.

II. Questions Raised by Petition.

1. Whether the Court of Appeals may apply substantive law which is in direct conflict with applicable State law.

2. Whether a Court of Appeals may disregard jury findings supported by evidence, thereby violating the Seventh Amendment.

The respondent submits that the questions advanced in this petition, as recited above, are neither accurate nor appropriately framed. The real question raised by the petition is as follows: Will this Court grant a writ of cer-

tiorari to review the question of whether, on the record, the evidence was sufficient for the case to go to the jury where the Court of Appeals, fulfilling its proper function, has ruled, after careful review, that the evidence was not sufficient? Regardless of the wording used by the petitioner's attorneys, *this* is the question reflected in the petition. Although the respondent will make its arguments below within the framework of the questions which the petitioner has conjured, the respondent trusts that the Court recognizes the real question behind the petition and will review the arguments accordingly.

III. Reasons for Denying Writ.

1. THE SUBSTANTIVE LAW WHICH THE COURT OF APPEALS APPLIED HERE WAS NOT IN CONFLICT WITH THE APPLICABLE STATE LAW, AND, MOREOVER, WAS FULLY IN ACCORD WITH THAT LAW.

The first question which the petitioner strives to raise as a ground for review in this Court is based upon the assumption that the Court of Appeals, in arriving at its decision, applied substantive law which was directly contrary to applicable State law. Petitioner's attorneys would like to leave the impression that the Court of Appeals, and more particularly Judge Bailey Aldrich, who wrote the Opinion,[2] totally ignored the applicable Massachusetts de-

[2] Judge Bailey Aldrich's direct experience with Massachusetts law surely cannot be questioned. He was admitted to the Massachusetts Bar in 1932 and practiced from 1932 until 1954 as a trial lawyer with the well-known firm of Choate, Hall & Stewart in Boston. He was first appointed to the bench as a District Court Judge for the District of Massachusetts in 1954, and for the last six years he has sat on the Court of Appeals. The respective judicial backgrounds of Judge Edward W. Day and Judge John P. Hartigan, both of whom joined in the Opinion written by Judge Aldrich, are even more extensive.

cisions[3] which, it is agreed, were controlling as to the substantive law to be applied here (Pet. 9-11).

Even a hasty reading of the Opinion shows clearly that the Court below carefully reviewed all relevant Massachusetts decisions and, only after such careful review, concluded that, based upon the tests and standards set forth in those decisions, the petitioner had not established a case against the respondent under Massachusetts law.[4] The Court evaluated the duty imposed upon a landowner in Massachusetts, and the many refinements and exceptions which have built up around that duty over the years, by citing its reliance (on just one page of its Opinion) upon ten current Massachusetts decisions (Pet. 16; 338 F. 2d 644, 646).

It is noteworthy that the petitioner's attorneys, in contending here that the Court below ignored Massachusetts law, cite three of the cases which they relied upon in the brief they filed in the Court of Appeals.[5] These three cases represent a type of exception to the general standard which the Massachusetts Courts customarily follow. The Court of Appeals, however, was more than passively aware of the exception reflected in these three cases. The Court explic-

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[3] It should be noted, however, that petitioner's attorneys, when first stung by the reversal, levelled even stronger charges against the Court below, stating in their petition for rehearing that the Court of Appeals did not "have the grace to cope with and answer the major argument of the plaintiff"; that it had reached "a new low in deviation in tort law"; and that "no other Circuit Court in the country would nullify this verdict" (Pet. for Reh. 3, 5, 6).

[4] It is noted that the Court below also recognised that the trial judge did not correctly construe the standard of duty which is owed to a business invitee in Massachusetts (Opinion, Pet. 16).

[5] *Barrett* v. *Builders' Patent Scaffolding Co., Inc.*, 311 Mass. 41; *Hayes* v. *Boston Fish Market Corp.*, 319 Mass. 556; and *Lajeunesse* v. *Tichon's Fish & Fillet Corp.*, 328 Mass. 528.

itly referred to the "exception" in its Opinion, and in doing so, moreover, cited the *Hayes* case, upon which the petitioner now relies.

The Court pointed out that in Massachusetts a landowner is not liable to a business invitee if the invitee had knowledge of the hazard which caused his injuries, but in certain cases the landowner may not escape liability even though the invitee had knowledge of the danger if it could be found that he was reasonable in incurring the risk by confining himself to the area of the danger (Opinion, Pet. 16). As the Court below recognized, the plaintiff, having knowledge of the skids, could not rely on this exception, because it could not have been found on the evidence that he was in any way confined, in the work he was doing, to the area of the danger. This obviously was the key to the Court's decision (see footnote 2 of Opinion, Pet. 15). It was the petitioner and his two fellow employees who moved the drums into the section and put them into position. They could have put them anywhere within the section (encompassing an area of approximately 20,000 square feet).

It seems clear that the point which the petitioner's attorneys strive to raise in seeking a review by this Court under the guise of an alleged conflict between applicable State law and the law applied by the Court of Appeals is based upon a totally unwarranted assumption. It may be said that the Supreme Judicial Court of Massachusetts has, over the years, strictly limited the liability running to business invitees.[6] The development of these standards involves policy considerations which, of course, the Federal Courts cannot review. The refinements of those standards,

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[6] See, for example, *Rego* v. *Sagamore Manufacturing Co.*, 305 Mass. 346, and *Vance* v. *Wayside Inn, Inc.*, 335 Mass. 617. The plaintiffs in those two cases must have felt the strictness of the standards in Massachusetts far more than the petitioner is justified in complaining of here.

in some instances, may appear at first glance to be somewhat complicated in application, but this should not be twisted so as to make it appear that the Court below did not apply the law correctly in this case. On the contrary, it seems obvious that the petitioner's attorneys, having suffered reversal as a result of the true application of Massachusetts law, would like, in this isolated case, either to have intricacies of the substantive law of Massachusetts ignored or to have that law revised.

2. THE DIRECTION OF JUDGMENT FOR THE RESPONDENT WOULD NOT BE IN VIOLATION OF THE PETITIONER'S RIGHT TO A TRIAL BY JURY.

Before a case goes to the jury, the Court has a *duty* to determine whether the evidence is sufficient to warrant a recovery for the plaintiff, and, if the evidence does not warrant a recovery, the Court has the further duty to direct a verdict for the defendant. And it has long been recognized that, when the Court discharges this duty and directs a verdict for the defendant, the plaintiff cannot say that such action is in violation of his constitutional right to trial by jury under the Seventh Amendment. *Coughran* v. *Bigelow*, 164 U.S. 301, 308. *Treat Manufacturing Co.* v. *Standard Steel & Iron Co.*, 157 U.S. 674, 675. *Galloway* v. *United States*, 319 U.S. 372. *Smith* v. *Reinauer Oil Transport, Inc.*, 256 F. 2d 646, 649 (1st Cir., 1958).

Here the trial Court had obviously followed inaccurate legal standards in denying the respondent's motion for a directed verdict. In such a situation, when the appellate Court concludes, after reviewing the record, that the petitioner did not have a case which entitled him to go to the jury based upon correct standards of law, it becomes the duty of that Court to reverse the judgment and enter judgment for the defendant. The crucial question, therefore,

is again whether the Court of Appeals properly construed and applied the applicable substance of law of Massachusetts. Although the argument above related to the same question in another context, the respondent submits that those arguments also establish that the Court below was correct in concluding that the judgment should be reversed and entered for the respondent because the petitioner did not present a case which entitled him to go to the jury.

3. THE QUESTIONS RAISED BY THE PETITIONER ARE NOT SUCH AS ENTITLE HIM TO THE PRIVILEGE OF A REVIEW IN THIS COURT.

As mentioned above, the questions recited in the petition, when stripped of the assumptions which mask their true identity, actually turn out to be a mere request by the petitioner to have this Court review the legal sufficiency of the evidence presented in a common-law action which by no stretch of the imagination would have significance beyond this particular litigation.

In attempting to comply with Supreme Court Rule 19, which requires that there be "special and important reasons" for granting a review on a writ of certiorari, the petitioner's attorneys have raised the argument that the law applied by the Court of Appeals was in direct conflict with applicable State law. As can be seen from a reading of the Opinion, there is no conflict whatsoever between controlling law and the law applied. Any "conflict" here exists only in the minds of the petitioner's attorneys. In order to be entitled to a review there should be a real conflict between the controlling law and the applied law which is clearly and unquestionably reflected in the petition.[7]

[7] See, for example, *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, where the Federal District Court, in a personal-injury action based upon diversity of citizenship, refused to follow the State law requiring the submission of all questions relating to contributory negligence to the jury.

Even if the petitioner could say there was even some slight conflict here, which he cannot, the question still would not, as the petitioner's attorneys would like to contend, be of "great and demanding importance" (Pet. 12). It borders on the absurd to argue, as petitioner's attorneys do, that, if review is not granted here and the judgment below reversed, the United States Courts will become "a haven for denial of jury trial" and the "normal pattern of removal from state courts to Federal courts will be seriously distorted" (Pet. 12). Certainly, if review were to be granted in this case and judgment reversed, the substantive law of Massachusetts would not be changed at all thereby. And it would be totally unrealistic to think that such action would deter defendants in future cases from securing removal to Federal Courts in order that they may take advantage of the methods of full discovery and the other many efficient procedures which are available in the Federal Courts and which are frequently missing in most State Courts.

If any pattern is in danger of being altered and distorted, it is the normal pattern of appellate review in the Federal Courts if review is granted here on what can only be construed as a routine question of the sufficiency of the evidence in a personal-injury action which is in the Federal Court because of the diversity of citizenship of the parties. The Federal Courts of Appeals were originally created under the Judicial Act of 1891 to fulfill this particular function of review in order to relieve the Supreme Court of the heavy burden of that function. This Court, over the years, has carefully refrained, and properly so, from reviewing routine questions involving the sufficiency of evidence except where there are attendant thereto unusual questions giving rise to unique and important policy considerations. No such unusual questions exist here.

This Court is faced with an increasing number of cases involving truly important questions in such areas as civil rights, separation of church and state, freedom of speech, and the constitutional rights of defendants in criminal cases in both Federal and State Courts, to name but a few areas, all of which involve, in varying degrees, significant policy considerations which are national in scope and which frequently affect every citizen in the Country in some way. With all the truly important cases seeking review in this Court, it would seem that the petitioner's attorneys have permitted their disappointment to becloud their thinking when they say that the question here involves issues of "great and demanding importance."

IV. Conclusion.

For the reasons stated above, the respondent submits respectfully that the petition for writ of certiorari filed by the petitioner should be denied.

Respectfully submitted,

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